BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

A concise statement of the case has been incorporated in the petition for *certiorari, supra* (2-8). The case is of general importance for the decree is in principle directly contrary to prior decisions of this court and decisions of other circuit courts, in that in the application of the plain statute under which petitioners were conferred vested rights, the opinion denies to them those rights by an unauthorized act of the predecessor of respondent, made without notice or an opportunity to be heard essential to due process of law, by reading into the statute language not therein contained—and, further, upon motion to dismiss, adjudicated affirmative matters not pleaded nor admitted.

(1) The applicable part of section 1 of the Osage Allotment Act, *supra,* reads as follows:

> "That the roll of the Osage tribe of Indians, as shown by the records of the United States in the office of the United States Indian Agent at the Osage Agency, Oklahoma Territory, as it existed on January 1, 1906, * * * is hereby declared to be the roll of the tribe and to constitute the legal membership thereof * * * and the tribal lands and tribal funds of said tribe shall be equally divided among the members of the tribe as hereinafter provided."

Section 6 of said act provides the lands, moneys and mineral interests of any deceased member shall descend to his legal heirs.

The words employed in section 1, *supra,* make it clear that those whose names were enrolled upon the tribal roll as it existed on January 1, 1906, subject to additions and eliminations set forth in the proviso (not material herein),

constituted the legal members who were to share in the division of the tribal property. *Levondale Lead & Zinc Co.* v. *Coleman,* 241 U. S. 432, 36 S. Ct. 644; *Kenny* v. *Miles,* 250 U. S. 58, 39 S. Ct. 417.

Bennie Strikeaxe being on the roll designated by Congress as constituting the legal members of the tribe, it follows: Upon passage of the Act of June 28, 1906, *supra,* the right to participate in the division of the tribal property was vested in Bennie Strikeaxe, if living, but being deceased on June 28, 1906, the date the act became effective, that right, under section 6 of the act, passed by descent to his legal heirs, the petitioners herein. It follows: The Secretary thereafter was without power or authority to strike said name from the roll or to eliminate said name from the compiled roll without notice or an opportunity to be heard essential to due process of law, and mandamus is the proper remedy to restore petitioners to *status quo. Garfield* v. *Goldsby,* 221 U. S. 249, 29 S. Ct. 62; *United States* v. *Wildcat,* 244 U. S. 111, 37 S. Ct. 561; *Brown* v. *Hitchcock,* 173 U. S. 473, 19 S. Ct. 485; *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 38 S. Ct. 99; *United States, ex rel. Turner,* v. *Fisher,* 222 U. S. 204, 32 S. Ct. 37; *Tiger* v. *Twin States Oil Co.,* 48 F. (2d) 509; *Memohah* v. *Schaffer Oil Co.,* 30 F. (2d) 665. The Circuit Court of Appeals recognized the principle of law announced in the above decisions and concluded the first ground of the motion that the Act of June 28, 1906, *supra,* deprived the courts of jurisdiction was not well taken and further concluded the petition stated a *prima facie* case for relief by mandamus.

(2) The above facts being established under settled law, the court erred in not reversing the case and directing the respondent to answer. *Kansas* v. *Colorado,* 185 U. S. 125, 22 S. Ct. 522; *Reconstruction Finance Corp.* v. *Central*

Republic Trust Co., (D. C.) 11 Fed. Sup. 976; *White* v. *Federal Radio Corp.*, (D. C.) 29 F. (2d) 113; *Ansehl* v. *Puritan Pharmaceutical Co.*, (C. C. A.) 61 F. (2d) 131; *Bronk* v. *Charles H. Scott Co.*, (C. C. A.) 221 Fed. 338.

The exception to the settled law that the court should overrule a motion to dismiss when the petition states a *prima facie* case is stated in the last case above cited, as follows:

> "If a bill, in and by its own averments, states a *prima facie* case, that case cannot properly be overthrown by the chancellor merely on the ground that he judicially knows of facts that would support an answer. His judicial knowledge must go farther and be so broad and all-embracing that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the bill. This is so because, if such facts exist, the complainant is entitled to a hearing where he can present and argue the facts, and such a hearing cannot be had on a demurrer to the bill."

The facts as stated relied upon for dismissal are not adjudicated facts, but consist of speculative defenses or based upon admissions of facts set forth in an answer in *Ickes* v. *Pattison*, 65 App. D. C. 116, 80 F. (2d) 708. The admissions made by petitioners in said case cannot be binding on petitioners as adjudicated facts in this case. *Webster* v. *Fall*, 266 U. S. 507, 45 S. Ct. 148; *In re Heff*, 197 U. S. 488, 25 S. Ct. 506. It is clear under the authority of *Kansas* v. *Colorado, supra*, the Court of Appeals erred under the admitted facts in sustaining the motion to dismiss the petition.

(3) The opinion as a basis for affirming the judgment of the trial court is founded upon the theory that a writ of mandamus is not a writ of right and may be refused for reasons comparable to those which would lead a court of equity

in the exercise of a sound discretion to withhold an undoubted legal right. Citing *United States* v. *Dern*, 289 U. S. 352, 53 S. Ct. 614.

It may be accepted as a correct statement of law that upon considering a case upon the merits, a court may, in the exercise of sound judicial discretion, withhold the issuance of a writ of mandamus. However, this is far from holding that the court may disregard the allegations of a petition that states a *prima facie* case and withhold such a right upon a motion to dismiss. *United States* v. *Dern, supra*, was not decided upon motion to dismiss, but upon the merits after answer and an opportunity to be heard and present evidence.

Turner v. *Fisher, supra*, and *Duncan Townsite Co.* v. *Lane, supra*, involve the power of the Secretary to arbitrarily strike names from the roll. In both of said cases an answer was filed alleging the parties were on the roll by fraud. The petitioners in said cases admitted by demurrer the names were placed upon the roll by fraud. The court denied relief as the petitioners in said cases admittedly did not come into court with clean hands. In *Ickes* v. *Pattison, supra*, petitioners admitted by demurrer that Timothy Hamilton was never upon the roll in his lifetime, but had been placed thereon after death for a specific purpose.

Said cases lend no support to the theory the court may, on motion, adjudicate affirmative defenses not pleaded nor admitted and thus deprive the petitioners of the right to be heard or to controvert facts that may exist in the mind of the court. To do so would constitute a denial of due process of law just as effectively as if the party had never been given an opportunity to be heard. The basis of the opinion involved is to adjudicate facts not pleaded or admitted upon the theory the court believed said facts would constitute affirmative defenses. This is error.

(4) The court below in interpreting or applying the Osage Allotment Act, *supra,* states the literal language used by Congress made the roll as it existed on January 1, 1906, conclusive except for fraud. However the court concluded:

(a) It was manifest that Congress had no purpose of re-creating rights in the estate of a dead man which had been terminated by death and, therefore, the rights of these petitioners to recover depend upon establishing their father, Bennie Strikeaxe, was alive on January 1, 1906, and, if the Government had answered, which was preferable, and denied that Bennie Strikeaxe was alive on January 1, 1906, the burden of showing the contrary would have devolved upon the appellants. In this, the court erred.

It is the settled general law in the absence of statute that a member of a tribe has no alienable or inheritable interest in tribal property and his interest ceases upon death. *LaRoque* v. *United States,* 239 U. S. 62, 36 S. Ct. 22; *Gritts* v. *Fisher,* 224 U. S. 640, 32 S. Ct. 580. The rights of petitioners, however, are not based and founded upon the general law, but, on the contrary, upon a plain, clear statute which declares a certain roll to be the roll of the tribe for the purpose of making distribution to those whose names appear upon the roll and, if deceased, to their heirs. Congress knew or had reason to believe that some of the members whose names appeared upon the roll as it existed on January 1, 1906, were deceased on the date the act became effective, June 28, 1906. Under the general law the rights in the tribal property of all those whose names appeared upon the designated roll who were deceased prior to June 28, 1906, ceased and terminated upon their death. The only purpose of section 6 of the act, *supra,* was to recreate and re-establish in those who were deceased on June 28, 1906, the right to have their heirs participate in the distribution of the tribal property. The conclusion of the court is unsound both in fact and in law.

(b) The court below does not directly hold the Osage Allotment Act, *supra*, is ambiguous in so far as it declares a roll to be the roll of the tribe, but in application of the same the court indirectly places an interpretation thereon inconsistent with the applicable rules of construction announced by this court, and inconsistent with the words employed in the act, by reading into the clause:

> "Is hereby declared to be the roll of the tribe and to constitute the legal membership thereof,"

the language, "those living on January 1, 1906," and applies said clause as if it read:

> "Is hereby declared to be the roll of the tribe (and those living on January 1, 1906) to constitute the legal membership thereof."

In doing so the court erred and the opinion is in conflict with the former decisions of this court relating to applying an interpretation of statutes. In *United States* v. *Mo. Pac. Ry. Co.*, 278 U. S. 269, 49 S. Ct. 133, the court stated as follows:

> "* * * The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherance to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure upon conditions to raise doubt in order that result may be had to construction. It is elementary that, where no ambiguity exists, there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation."

See also *Caminetti* v. *United States*, 242 U. S. 470, 37 S. Ct. 192; *United States* v. *Goldenberg*, 168 U. S. 95, 18 S. Ct. 3;

Red Wing Malting Co. v. *Willicuts,* 15 F. (2d) 626 (8 C. C. A.), wherein the court stated:

> "Courts must endeavor to arrive at meaning of statute from its language, and should not attempt to write new language therein."

The Circuit Court of Appeals for the District of Columbia, in *De Ruiz* v. *De Ruiz,* 88 F. (2d) 752, stated as follows:

> "While it is the duty of the courts in interpreting legislation to ascertain, if possible, the intent of the legislature, we must not overlook the general rule of statutory construction that such intent is to be found in the language employed. *United States* v. *Goldenberg,* 168 U. S. 95, 103, 18 S. Ct. 3, 42 L. ed. 394. When the words used are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning. *Caminetti* v. *United States,* 242 U. S. 470, 37 S. Ct. 192, 61 L. ed. 442, L. R. A. 1917F 502, Ann. Cas. 1917B, 1168B."

See also *Reconstruction Finance Corporation* v. *Central Republic Trust Co., supra.*

Adherence to the statute as written leads to nothing impossible or plainly unreasonable. This court has never construed said section of the statute as to the exact question reflected in the opinion. However, this court has heretofore applied the statute as written without difficulty. *Kenny* v. *Miles, supra,* involved the question of whether there was any distinction between an allotment made to a living member of the tribe and a deceased member and, in referring to section 1 of the act, stated as follows:

> "* * * By its first section the act makes the tribal roll as existing January 1, 1906, with eliminations and additions not material herein, the authentic roll of the members for the purposes of the act. * * * all whose names were on the authentic roll were to share in the division of the tribal property * * * the death of a mem-

> ber entitled to an allotment does not extinguish his right * * *. Such allotments and all others are made under one comprehensive provision, in which there is no distinctive mention of either living or deceased members. * * *"

If Congress had intended on June 28, 1906, when the act was passed that only those living on January 1, 1906, whose names appeared upon the tribal roll should share in the distribution, it would undoubtedly have used appropriate language to so express said intent and conferred upon someone power and authority to determine such a material fact. A radical departure of the settled law of the right of the court to read into plain language of the act words not therein contained, is not lightly to be inferred. It is clear Congress made the roll as it existed on January 1, 1906, conclusive except for fraud.

The motion to dismiss admits there was no record, official or otherwise, existing in the Osage Agency on January 1, 1906, to disclose the death of Bennie Strikeaxe, and no record was made thereof until February 21, 1906. (R. 7-8)

(5) The opinion cites *Ickes* v. *Pattison, supra,* in support of its right to read into the statute language not therein contained. The facts in *Ickes* v. *Pattison* are materially different from the case at bar. In said case the heirs of Timothy Hamilton alleged that he was born October 20, 1905, and his name appeared upon the tribal roll as it existed on January 1, 1906, and he was alive on said date. The answer alleged the records reflected Timothy Hamilton died November 20, 1905, without ever being enrolled and his name was placed upon the roll December 3, 1905, under a resolution of the Osage Council in accordance with a custom for the sole purpose of receiving one payment after death. The motion for judgment on the pleadings admitted the allegations of the answer. The admission that he was not on

the roll during his lifetime but had been placed thereon after death for a limited purpose was sufficient to deny relief. *Turner* v. *Fisher, supra,* and *Duncan Townsite Company* v. *Lane, supra.* The court in said case, however, in referring to the manner of compiling a roll, stated as follows:

> "We think it clear that the act provided for compiling from the records at the agency, as they existed on January 1, 1906, the final roll of members entitled to participate in the division of the tribal property."

Said language is inconsistent with any theory other than that the records as they existed on January 1, 1906, were conclusive in compiling the roll.

Clearly if, as stated above in *Ickes* v. *Pattison,* the compilation of the roll was to be made from the records at the agency as they existed on January 1, 1906, and that is a correct pronouncement of the law, the opinion in the instant case is erroneous and in conflict therewith. In the instant case it is admitted the records at the agency as they existed on January 1, 1906, disclosed Bennie Strikeaxe was enrolled and should have been placed upon the compiled roll. The effect of the holding in the instant case is that the Secretary in compiling the roll may disregard the plain provisions of the act and arbitrarily eliminate from the compiled roll names without notice or an opportunity to be heard essential to due process of law. This is clearly error. The opinions are in direct conflict.

(6) The court as a further ground for denying relief, held the question of whether Bennie Strikeaxe was living on January 1, 1906, was departmental construction. Departmental construction is not available on motion to dismiss, but constitutes an affirmative defense which must be plead under paragraph (c), Rule 8 of the Rules of this court relating to District Courts effective September 1, 1938, pro-

mulgated in accordance with the Act of June 19, 1934 (48 Stat. L. 1064). The only basis for departmental construction is the holding in *Ickes* v. *Pattison* under facts materially different. The demurrer in said case admitted the departmental construction pleaded. In addition thereto, the records in said case affirmatively disclosed Timothy Hamilton was born October 20, 1905, and died November 20, 1905, without ever being enrolled and was placed upon the roll after death for a specific purpose. Under said facts the holding in said case cannot constitute a precedent in the instant case, based upon materially different facts and records.

The general rule of law is that administrative construction is entitled to the highest respect and, if followed for a number of years, will not be disturbed except for cogent reasons. *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, 49 S. Ct. 133; *Logan* v. *Davis*, 233 U. S. 613, 627, 34 S. Ct. 685, 5 L. ed. 1121. But the court is not bound by a construction so established. *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99, 40 S. Ct. 504, 64 L. ed. 801; *United States* v. *Dickson*, 15 Pet. 141, 161, 10 L. ed. 689. The rule does not apply in cases where the construction is not doubtful. And, if such interpretation has not been uniform, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons. *Brown* v. *United States*, 113 U. S. 568, 571, 5 S. Ct. 648, 28 L. ed. 1079; *Merritt* v. *Cameron*, 137 U. S. 542, 551, 552, 11 S. Ct. 174, 34 L. ed. 772; *United States* v. *Alabama R. R. Co.*, 142 U. S. 615, 621, 12 S. Ct. 306, 35 L. ed. 1134; *United States* v. *Healey*, 160 U. S. 136, 145, 16 S. Ct. 247, 40 L. ed. 369; *Studebaker* v. *Perry*, 184 U. S. 258, 268, 22 S. Ct. 463, 46 L. ed. 528; *Houghton* v. *Payne*, 194 U. S. 89, 24 S. Ct. 590, 48 L. ed. 888.

The petitioners plead a letter of the Commissioner of

Indian Affairs dated January 30, 1908 (R. 12-13), which reads in part as follows:

> "The roll should consist of *(1)* the names of the Osage tribal roll as it existed in your office on the first day of January, 1906; and *(2)* of the names of all persons, including adults and children, subsequently added thereto by direction of this office with the authority of the Secretary of the Interior in accordance with the provisions of section 1 of the act named.
>
> "The column for remarks in the roll should show the date and the file number of the authority for each name added to the roll 'as it existed on the first day of January, nineteen hundred and six'."

The letter above repels any inference inconsistent with the theory that the roll was disclosed by the records as they existed on January 1, 1906, was conclusive upon the agent in compiling the roll.

Certainly there is no language in the letter to support the theory the department, in construing said statute, had read into the plain language of the statute words not therein contained or that would confer upon the Secretary powers not conferred by the act, or that would justify the agent in compiling the roll to make a secret investigation and strike from the roll as it existed on January 1, 1906, names appearing thereon, or to eliminate said names from the compiled roll without notice or an opportunity to be heard.

The holding of the court relating to departmental construction upon motion to dismiss is clearly erroneous both in fact and law.

(7) The question of laches is an affirmative defense except when disclosed upon the face of the petition. The allegations of the petition must be taken as true. In *Oklahoma Oil Co.* v. *Bartlett,* 236 Fed. 488, it is stated: "No laches can be imputed to Jack Gauge. He and his land were under

the control of the Government." Laches is not a defense to perpetrate a fraud or injustice, but to prevent one. Petitioners are wards of the Government—their father was crazy on December 13, 1905—they, at the time of the passage of the act, were minors of tender years. It was the duty of the Government under the various Acts of Congress not only to protect them and their property rights, but to see that they obtained their just distributive share of the lands and funds and that other members did not receive in excess of their just portion. *Tiger* v. *Twin States Oil Co.*, 48 F. (2d) 509; *Heckman* v. *United States*, 224 U. S. 413, 32 S. Ct. 424. It is fundamental that a guardian cannot rely upon delay based upon his own wrong or neglect as a defense when he has in his possession tribal property to restore petitioners to *status quo.*

The court further concludes that due to the fact that the land had been allotted and had passed into many hands, relief should be denied. The petition in the case at bar alleges the mineral rights under these lands are still held in trust by the Government. The court, therefore, has a right to grant petitioners relief out of the tribal property in its possession sufficient to place them in *status quo. Gritts* v. *Fisher, supra.* The fact that the court might not, upon final hearing, give to petitioners all the rights they demand, does not justify the court in dismissing the petition. *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 30 S. Ct. 10.

It is not intimated that the petitioners or their father were guilty of any wrong conduct. Their right is based and founded upon a statute that is plain—they have been deprived of that right by predecessor of respondent acting beyond his authority.

The opinion cites *Ellis* v. *Jump*, 100 F. (2d) 130, wherein petitioners sought to have certain pencil notations now

appearing on the tribal roll erased as they had been made thereon after January 1, 1906, by some person without authority of law and were no part of the roll as it existed on January 1, 1906. The case was disposed of upon motion on the sole ground the Secretary of the Interior was not a necessary party. The case has no application.

In the instant case the court has decided an important question of substance relating to the construction and appication of the Osage Allotment Act, *supra,* by reading into said plain and unambiguous statute language not therein contained, the force and effect of which has been to deprive these petitioners who are wards of the Government of valuable property rights conferred upon them by statute without notice or an opportunity to be heard essential to due process of law. There is further presented the right of these petitioners to be heard upon affirmative defenses relied upon by the court in sustaining motion to dismiss.

The duty of the United States under the peculiar trust relation which it bears to these petitioners cannot be satisfied by denying to them valuable rights which it was the duty of the Government to protect by reading into the statute language not therein contained or based upon affirmative defenses, although admitting the acts of the Secretary of the Interior which deprived these petitioners of these rights were without authority of law. Nor will that duty of the United States be fully satisfied unless the questions herein presented are fully decided by this court.

Wherefore, it is respectfully submitted that this petition should be granted.

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